NO. 75-1086

In the Supreme Court of the United States

OCTOBER TERM, 1975

FRANK SPALITTA, ET AL

Petitioners

vs.

EXCHANGE NATIONAL BANK OF CHICAGO

Respondent

Petition for a Writ of Certiorari to the Supreme Court of Louisiana State of Louisiana

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INDEX

AUTHORITIES

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Petitioners, C. ELLIS HENICAN and PHILIP E. JAMES, pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Louisiana entered on March 31, 1975, and the Judgment on Rehearing entered on November 3, 1975.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana (Appendix B, *infra*, page B 17) is reported in 321 So. 2d 338 (La. 1975). The opinion of the Louisiana Court of Appeal, Fourth Circuit, (Appendix B, *infra*, page B 25) is reported 295 So. 2d 18 (La. 1974). The Reasons for Judgment assigned by the Civil District Court, Parish of Orleans, State of Louisiana (Appendix B, *infra*, page B 38) are unreported.

JURISDICTION

The Judgment of the Supreme Court of Louisiana was entered on March 31, 1975. A rehearing was granted to petitioners, C. Ellis Henican and Philip E. James, and Judgment on Rehearing was entered November 3, 1975. Under the rules of the Supreme Court of Louisiana, particularly Rule 9 Section 5, petitioners were not entitled to another rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether a state's Deficiency Judgment Act is in conflict with the provisions of Chapter X of the Federal Bankruptcy Act.

2. Whether or not Article VI of the United States Constitution prevents the application of a state's Deficiency Judgment Act to an obligation, involving a principal debtor which is under the jurisdiction of the Federal Bankruptcy Court pursuant to Chapter X of the Federal Bankruptcy Act.

3. Whether the Federal Bankruptcy Act permits application of the laws of the various states, which laws are not in conflict with the purposes and policy of the Federal Bankruptcy Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article VI of the Constitution of the United States; Chapter X of the Bankruptcy Act, 11 U.S.C. § 501 *et seq.*; Louisiana Revised Statutes Title 13, sections

4106 and 4107; Article 2771 of the Louisiana Code of Civil Procedure.

STATEMENT

This case involves a claim by Respondent for a deficiency judgment against the accommodation guarantors of a promissory note executed by Place Vendome Corporation, and secured by mortgages on a number of properties owned by the said maker. Place Vendome Corporation was placed in corporate reorganization, pursuant to Chapter X of the Federal Bankruptcy Act. During the corporate reorganization proceedings, Respondent petitioned for a sale of the mortgaged property, and the Bankruptcy Court ordered the trustee to sell the properties applying the price to the amount allegedly due.

The sale of the mortgaged properties was conducted in violation of the Louisiana Deficiency Judgment Act, La. R.S. 13:4106-4107, which provides that failure to comply with its provisions results in the creditor's losing its right to obtain a deficiency judgment against the maker or the guarantors of the note.

Petitioners herein filed an exception of No Cause of Action, which was maintained by the Civil District Court, Parish of Orleans, State of Louisiana (Appendix B, *infra*, p. B 38). The Louisiana Court of Appeal, Fourth Circuit, unanimously affirmed (Appendix B, *infra*, p. B 25). The Supreme Court of Louisiana, with three dissents, reversed, holding that the Bankruptcy Act requires absolute uniformity in the various states, and thus is in conflict with the Louisiana Deficiency Judgment Act and that under Article VI of the United States Constitution (the Supremacy Clause) the Louisiana Deficiency Judgment Act is rendered inapplicable. This opinion was reinstated on rehearing, again

with three dissents. Of the eleven Judges who examined the question, seven (the trial judge, the three members of the Louisiana Fourth Circuit Court of Appeal and three of the seven justices of the Louisiana Supreme Court) were in complete disagreement with only four justices of the Louisiana Supreme Court on the vital question herein presented.

RAISING OF THE FEDERAL QUESTIONS

The Federal Questions here presented were specifically raised by a written Motion for New Trial in the Civil District Court, Parish of Orleans, State of Louisiana, on March 15, 1973. The Federal questions were considered and discussed in the opinion of the Louisiana Court of Appeal, Fourth Circuit (Appendix B, *infra*, p. B 25). The opinion of the Supreme Court of Louisiana (Appendix B, *infra*, p. B 17) considered, discussed and relied on the Federal questions presented herein.

REASONS FOR GRANTING THE WRIT

The decision of the Louisiana Supreme Court seriously misinterprets Article VI of the United States Constitution, the Supremacy Clause, together with the provisions and purpose of Chapter X of the Bankruptcy Act, 11 U.S.C. § 501 *et seq*. The decision is in conflict with *Hines v. Davidowitz*, 312 U.S. 52, which provided the rationale for determining whether a state law is unconstitutional as being in conflict with a Federal law or regulatory scheme. The decision is in conflict with *Stellwagen v. Clum*, 245 U.S. 605, which held that the Bankruptcy Act may recognize the laws of the various states in certain particulars even though such recognition may lead to a different result in different states, and with *Hanover National Bank v. Moyses*, 186 U.S. 181. The decision is further in direct conflict with *In re: Wilton-Maxfield Management Co.*, 117 F.2d 913 (9th Cir. 1941), *Meadowbrook National Bank v. Massengill*, 427 F.2d 1055 (5th Cir. 1970), and *Bowl-Opp, Inc. v. Larson*, 334 F. Supp. 222 (E.D.La. 1971), all of which held that Article VI of the United States Constitution, and Chapter X of the Bankruptcy Act, 11 U.S.C. §501 *et seq*. did not prohibit the application of a state's Deficiency Judgment Act in bankruptcy (reorganization) proceedings.

The Supremacy Clause of the United States Constitution, Article VI, sets forth the fundamental relationship between Federal and State laws:[1]

> "The laws of the United States..... shall be
> the supreme law of the Land."

In attempting to effectuate this policy, state laws have been declared unconstitutional if their relationship with Federal law has been found to be "conflicting." *Hines v. Davidowitz, supra*, and cases cited therein. One of the most significant cases in this respect is *Hines v. Davidowitz, supra*, wherein the Court held that a state alien registration law was unconstitutional because the Federal Alien Registration Act precluded state action on the same subject. In explaining its approach to an analysis of the Supremacy Clause the Court declared that its primary function was to determine whether a contested state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 312 U.S. at 67. The crucial question in this determination is whether the "Federal enactments preclude the enforcement of state laws on the same subject." 312 U.S. at 70.

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1. See, generally Hart, *The Relations Between States and Federal Law*, 54 Colum. L. Rev. 489 (1954).

The Louisiana Supreme Court held, in this case, that the Federal Bankruptcy Statutes, which were enacted "in the interest of uniformity," (Appendix B, *infra*, p. B 17), precluded state Deficiency Judgment Acts from operating, even outside of bankruptcy! The Bankruptcy Act, and the cases interpreting that act, clearly reveal that there is no such policy of absolute "uniformity." On the contrary, the laws of the states are incorporated, either directly or by inference, into the Bankruptcy Act, and govern its operation in many important particulars, as stated in *Stellwagen v. Clum*, *supra*:

> "[T]he Bankruptcy Act of Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different states.....
>
> "It is only state laws which conflict with the bankruptcy laws of Congress that are suspended...." 245 U.S. at 613.

In *Thomas v. Woods*, 173 F. 585 (8th Cir. 1909), the argument was made that if the laws of the several states are made applicable to the estates of bankrupts, it would cause the Bankruptcy Act to be non-uniform. The Court rejected this view, pointing out that when Congress legislated on the subject of bankruptcy, it designed a system which depends heavily on the laws of the states, because it would be impossible for Congress to make the results of the law of bankruptcy uniform, without establishing a comprehensive code embracing the entire subject matter of civil law. Since Congress has not chosen to enact such a comprehensive code, it is not only permissable, but necessary, that state law be incorporated into the bankruptcy statute. It is, therefore, only state laws which come into direct conflict with pro-

visions of the Bankruptcy Act, which are rendered inapplicable by the Supremacy Clause, Article VI of the United States Constitution. *Hanover National Bank v. Moyses*, *supra*. The Louisiana Deficiency Judgment Act in no way conflicts with the purposes or provisions of the Bankruptcy Act. Congress has not established rules for obtaining a deficiency judgment in bankruptcy proceedings, and consequently, there has been unanimous recognition by the Federal Courts that a state Deficiency Judgment Act must be applied.

In a suit against the guarantor of a note secured by real estate, the Ninth Circuit Court of Appeals relied on the California Deficiency Judgment Act despite the fact that the property which secured the note was involved in bankruptcy proceedings. In re: *Wilton-Maxfield Management Co.*, *supra*. The Ninth Circuit Court of Appeals found that the requirements of the state act were not in conflict with the provisions of the Bankruptcy Act, and since the Deficiency Judgment Act had not been complied with, the creditor was denied a deficiency judgment. Similarly, in *Meadowbrook National Bank v. Massengill*, *supra*, the Fifth Circuit Court of Appeals applied the Louisiana Deficiency Judgment Act in a suit against the endorsers of a note to collect a deficiency which existed after a foreclosure sale of the mortgaged property in Bankruptcy proceedings. Again, no conflict between the state Deficiency Judgment Act and the Federal Bankruptcy Act was found. A similar holding was *Bowl-Opp, Inc. v. Larson*, *supra*. The court recognized the right of the state to govern the relationship between a creditor and an endorser after finding that there was no conflict between the Louisiana Deficiency Judgment Act and the Federal Bankruptcy Act. In this case the Louisiana Supreme Court did not base its holding on Louisiana's Law but reached into the Federal law in deciding that the Louisiana Deficiency

Judgment Act is not available where the basis for a deficiency judgment is predicted on a non-conforming sale under the Federal Bankruptcy Act.

The Supreme Court of Louisiana, in this case, relied on *J. Ray McDermott & Co., Inc. v. Vessel Morning Star*, 457 F.2d 815 (5th Cir. 1972), a case involving Federal admiralty and maritime law, and the Federal Ship Mortgage Act, 46 U.S.C. § 921 *et seq*. The *Morning Star* case involved an action in which a creditor sought a deficiency judgment under the Federal Ship Mortgage Act. The Fifth Circuit Court of Appeals held that Congress had provided a means of obtaining a deficiency judgment in connection with a mortgage created under the Federal Ship Mortgage Act and thus the state law would not apply. The holding of the Fifth Circuit Court of Appeals was limited specifically to the applicability of the Louisiana Deficiency Judgment Act to the Federal Ship Mortgage Act and did not purport to restrict the Louisiana Deficiency Act's application to mortgages created pursuant to state law.

The reliance of the Supreme Court of Louisiana on an admiralty decision is error. Perhaps a leading example of a preemptive Federal scheme is admiralty. When the United States Constitution was framed, a system of exclusive admiralty jurisdiction was incorporated, placing the entire subject under national control because of its intimate relation to navigation and foreign commerce. United States Constitution Article III § 2, Clause 1. A landmark decision in this area is *Southern Pacific Co. v. Jensen*,244 U.S. 305, in which the Admiralty Clause of the United States Constitution was invoked and the policy of uniformity was relied on to strike down a state statute. *Southern Pacific Co., supra*, established the doctrine that the same law must be applied in all courts *in admiralty and maritime cases.* There is no such doctrine

of uniformity in bankruptcy matters.

The decision of the Supreme Court of Louisiana is in direct conflict with Article VI of the United States Constitution and the cases decided thereunder.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

I hereby certify that the above and foregoing has been served upon Respondent by mailing a copy of same to its attorney of record, Leo S. Roos of the firm of Roos and Roos, through the U. S. Mail, postage prepaid, and addressed to him at Suite 1504, First National Bank of Commerce Building, New Orleans, Louisiana, 70112. this 29th day of January, 1976.

C. ELLIS HENICAN, JR.

APPENDIX A

JURISDICTION OF COURTS 3 §2, Cl. 1

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

SUPREME LAW OF LAND 6, cl. 2

ARTICLE VI. - DEBTS VALIDATED. SUPREME LAW OF LAND

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and

the Judges in every State shall be bound thereby, any Thing in the Constitutioin or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

§ 4106. Deficiency judgment prohibited if sale made without appraisement

If a mortgagee or other creditor takes advantage of a waiver of appraisement of his property, movable, immovable, or both, by a debtor, and the proceeds of the judicial sale thereof are insufficient to satisfy the debt for which the property was sold, the debt nevertheless shall stand fully satisfied and discharged insofar as it constitutes a personal obligation of the debtor. The mortgagee or other creditor shall not have a right thereafter to proceed against the debtor or any of his other property for such deficiency, except as provided in the next paragraph.

If a mortgage or pledge affects two or more properties, movable, immovable, or both, the judicial sale of any property so affected without appraisement shall not prevent the enforcement of the mortgage or pledge in rem against any other property affected thereby. As amended Acts 1952, No. 20, § 1; Acts 1960, No. 32, § 1.

§ 4107. R.S. 13:4106 cannot be waived; operation prospective

R. S. 13:4106 declares a public policy and the provisions thereof can not, and shall not be waived by a debtor, but it shall only apply to mortgages, contracts, debts or other obligations made, or arising on or after August 1, 1934.

Art. 2771. When deficiency judgment obtainable

The creditor may obtain a judgment against the debtor for any deficiency due on the debt after the distribution of the proceeds of the judicial sale only if the property has been sold under the executory proceeding after appraisal in accordance with the provisions of Article 2723.

APPENDIX B

OPINION OF SUPREME COURT OF LOUISIANA
Filed: Monday , March 31, 1975

SUPREME COURT OF LOUISIANA
NO. 55,012

EXCHANGE NATIONAL BANK OF CHICAGO, ET AL.
versus
FRANK SPALITTA, ET AL.

ON WRIT OF REVIEW TO THE COURT OF APPEAL,
FOURTH CIRCUIT, PARISH OF ORLEANS.

BARHAM, Justice.

This suit was filed by Exchange National Bank in an attempt to collect money owed to it by Place Vendome Corporation from the latter's accommodation guarantors, C. Ellis Henican, Philip E. James, and Frank Spalitta. Place Vendome Corporation is a subsidiary of Southern Land Title Corporation, both of which are presently in bankruptcy proceedings under Chapter X of the Bankruptcy Act, the chapter providing for corporate reorganization. 11 U.S.C. §§ 501 *et seq*.

The three defendants signed a continuing guaranty *in solido* for all sums advanced to Place Vendome Corporation by Exchange National Bank and National American Bank of New Orleans, up to $1,824,234.00. Following the execution of a collateral mortgage on several French Quarter properties owned by Place Vendome, Exchange National Bank advanced several large sums of money to Place Vendome for

construction purposes.

In June, 1967, Place Vendome and Southern Land Title Corporation invoked bankruptcy proceedings by a petition for corporate reorganization entitled In the Matter of Southern Land Title Corporation, Debtor, No. 67-135 on the docket of the United States District Court for the Eastern District of Louisiana. During the corporate reorganization proceedings, Exchange National Bank petitioned for a sale of the mortgaged properties. Pursuant to its authority under Chapter X, the court ordered the trustee to sell the properties at a public auction where Exchange National Bank purchased them, applying the price to the amount allegedly due it.

During the pendency of the reorganization proceedings, but before the sale of the property, Exchange National Bank filed this suit in state court on its collateral mortgage note. (National American Bank, an original plaintiff, dismissed its suit with prejudice.) Following the sale of the property, Exchange National Bank amended its petition in order to include the sale, seeking only the balance due on the note after the sale of the property. The defendants filed an exception of no cause of action on the ground that a deficiency judgment was barred by failure to comply with La. R. S. 13:4106-107 because the property was not sold under executory proceedings with notice of seizure and proper appraisal and because compliance with the Act was not alleged in the petition, plaintiffs responded that compliance was not necessary because the Louisiana Deficiency Judgment Act does not apply to sales ordered in corporate reorganization proceedings under Chapter X.

The trial court sustained the exception of no cause of action, holding that the bank had lost its right to a deficiency

judgment against the guarantors by its failure to follow the requirements of La. R. S. 13:4106 *et seq.* The court of Appeal affirmed. 295 So.2d 18 (La. App. 4th Cir. 1974). We granted certiorari to review that decision. 299 So.2d 360 (La. 1974). We reverse the judgment of the court of appeal and set aside the ruling of the trial court sustaining the exception of no cause of action.

Although we are in agreement with the finding in the trial court that the requirements of the Deficiency Judgment Act were not complied with, it is our opinion that it is not necessary to address ourselves to that issue because of our threshold determination that the Louisiana Deficiency Judgment Act is not applicable to sales under Chapter X of the Bankruptcy Act.

From the record, it appears that Place Vendome Corporation filed for voluntary reorganization under Chapter X on June 19, 1967, following the initiation of reorganization proceedings by its parent corporation, Southern Land Title Corporation. On June 21, 1967, the federal district court approved the petition and appointed a trustee. At this time, title to all of the debtor's property passed to the trustee under 11 U.S.C. §586, retroactive to the date of the filing of the petition. *See* In Re Susquehanna Chemical Corp., 81 F. Supp. 1 (W.D. Pa. 1948), *aff'd*, 174 F.2d 783 (3d Cir. 1949). Thus, Place Vendome, by filing the petition, voluntarily divested itself of all property, title to which passed to the trustee who represents the general creditors and who was appointed with the approval of the federal district judge. 11 U.S.C.§ 72.

If the proceeding had been one in straight bankruptcy, it would have been the duty of the trustee to liquidate the estate in a manner which would produce the greatest return

for the general creditors. In straight bankruptcy, all sales must comply with 11 U.S.C. §110 (f), which requires the appointment of appraisers and a price not less than 75% of the appraised value. However, in corporate reorganization under Chapter X, the object is reorganization and recapitalization rather than liquidation, and in accordance therewith, the trustee is vested with the extraordinary power to sell or lease property in any manner which improves the strength of the debtor corporation and protects the creditors. This grant of authority is conferred by 11 U.S.C. § 516, which provides:

> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court –
>
> " * * *
>
> "(3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve; * * *."

The only limit upon this power is the sound discretion of the judge; 11 U.S.C. § 110(f) is specifically made inapplicable by the express wording of 11 U.S.C. § 502. See also Judge Augustus Hand's statement in In Re Loewer's Gambrinus Brewery Co., 141 F.2d 747, 750 (2d Cir. 1944):

> "* * * 11 U.S.C.A. Sec. 502 expressly provides that an appraisal shall not be necessary in a Chapter X proceeding unless an order shall be entered directing that bankruptcy be proceeded with pursuant to Chapters I to VII inclusive, 11 U.S.C.A. Sec. 1-112. In other words, Section 102 exempts sales in Chapter X proceedings from the necessity of appraisal which is required in straight bankruptcy."

The difference in requirements flows from the difference in objectives in straight bankruptcy as opposed to reorganization proceedings. These differences have been cogently explained in In re Dania Corporation, 400 F.2d 833, 836 (3d Cir. 1968), as follows:

> "In bankruptcy the object is to liquidate the assets of the bankrupt, to pay off his creditors as quickly and inexpensively as possible and to free the bankrupt from the burden of accumulated debt so that he may begin his business life anew. But the purpose of reorganization is not liquidation at all. If reorganization is successful the debtor corporation will continue to function, to pay its creditors, and carry on its business. The purpose of reorganization is to save a sick business, not to bury it and divide up its belongings.
>
> "After a petition has been approved, the District Court may exercise its discretion in ordering the sale of all or of a portion of the assets of the debtor. There is no requirement that a plan for reorganization must be submitted, nor even that

> the sale be in aid of reorganization, or that it await a liquidation in straight bankruptcy. Furthermore, Section 102 of the Act (11 U.S.C.A. § 502) renders an appraisal of the assets in Chapter X proceedings unnecessary unless the Court has ordered the instigation of bankruptcy proceedings. [citations omitted].
>
> "* * *It must be noted that Section 116 authorizes such sales to be made within the sound discretion of the Court 'upon cause shown.' The statute makes no reference to the necessity or an impending emergency. Furthermore, the weight of authority in the various circuits is that Section 116 sales are proper where there is justifiable cause present, and where the sale is in the best interest of the debtor and the majority of the creditors. [citations omitted]."

In addition to the discretionary power vested in the trial judge regarding sales of a debtor's property under §516, we note the well-established exclusive nature of the jurisdiction of the Bankruptcy Court over the debtor and its property under the provisions of 11 U.S.C.§ 511:

> "Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located."

The clause "*wherever located*" indicates the need, particularly in reorganization proceedings, for uniformity among the jurisdictions, as well as the need for exclusive jurisdiction in

a single court, because of the fact that a bankrupt debtor corporation often owns property in several states. The essential purpose of the jurisdictional statute, as described in Collier on Bankruptcy, is:

> "* * * to render the authority and control of the reorganization tribunal paramount and all-embracing to the extent required to achieve the ends contemplated by Chapter X; and to exclude any interference by the acts of others or *by proceedings in other courts* where such activities or proceedings in other courts tend to hinder the progress of reorganization." 6 Collier on Bankruptcy 424, ¶ 3.03 (14th ed. 1972). (Emphasis here and elsewhere supplied.)

There exists only one federal case resolving the issue of the applicability of the Deficiency Judgment Act to sales under Chapter X, *i.e.*, Bowl-Opp, Inc. v. Larson, 334 F.Supp. 222 (E.D. La. 1971). That was a diversity suit in which the federal district court judge was bound to apply Louisiana law to the situation before him. This issue being one of first impression in Louisiana courts in the instant case, the judge was constrained to apply what, in his opinion, Louisiana courts would find the law to be if given the same facts. The holding in *Bowl-Opp* was that the Louisiana Deficiency Judgment Act did apply to Chapter X sales, but that it had not been complied with since the property had been sold without appraisal. In the instant case, Louisiana courts are confronted with the issue for the first time, and, as we are not bound by the federal judge's interpretation of our law, we hold that the Act does not apply to Chapter X sales. It is our opinion that J. Ray McDermott and Co. v. Vessel Morning Star, 431 F.2d 714, *rehearing en banc*, 457 F.2d

815 (5th Cir. 1972), is the more preferable federal interpretation of the applicability of the Louisiana Deficiency Judgment Act to federal statutes which have been enacted in the interest of uniformity.

McDermott involved fishing vessels which had been foreclosed upon without appraisal; the shipbuilder attempted to enforce a guaranty against the defendant endorsers in spite of the lack of appraisal. Defendants sought protection under the Louisiana Deficiency Judgment Act. On first hearing, the three-judge panel held the Louisiana Act applicable, in spite of the pre-emption of the area by the National Maritime Act. However, on rehearing, the Fifth Circuit *en banc* overruled their decision, holding the Louisiana act inapplicable. The reasoning of the court was that it was clear that Congress intended that the ready availability of credit to support interstate commerce should not be impeded by state limitations, and that the National Maritime Act should therefore supercede completely all aspects of state law at variance with that purpose. The court stated:

> "* * * 'to engraft the various nuances of state law onto federal legislation would introduce an undesirable lack of uniformity in the interpretation of Congressional enactments' and would impede the harmony and uniformity sought by the Act. * * *"

In our opinion, the situation faced by the Fifth Circuit in *McDermott* is analogous to the one before us in the instant case. To impose the Louisiana requirements of executory process on sales made pursuant to court order under Chapter X and to render such sales subject to deficiency judgments in state courts while corporate reorganization is still pending

in federal court would also "introduce an undesirable lack of uniformity in the interpretation of Congressional enactments" and would impede the uniformith sought by Congress in passing the Federal Bankruptcy Act.

Moreover, resort to the Louisiana Deficiency Judgment Act is not necessary to fill any gaps in the federal bankruptcy law. Although Chapter X sales are not made pursuant to the specific appraisal and notice requirements of the Deficiency Judgment Act, there nevertheless exist procedural safeguards for the protection of both debtors and creditors. For example, once a bankruptcy petition is approved, the debtor no longer owns the property; title vests immediately in the trustee who, as representative of the general creditors, seeks to achieve the highest price for the secured creditors in order to reduce the deficiency against the debtor, who will be protected by the discharge. Any deficiency will be claimed by the secured creditor in the status as general creditor, with a consequent reduction in the assets for distribution.

Under Chapter X, the trustee petitions, in his capacity as owner, for permission from the court to sell property. His function, in the interests of both debtor and creditors, is to reorganize the bankrupt corporate debtor, eliminating as much of the debt as possible by sale of property as he deems it necessary. It is within his discretion to retain the property and include the secured creditor in his plan of reorganization if that option appears to be preferable upon consideration of the particular circumstances and the status of the corporate bankrupt which he is reorganizing. All petitions for sales are subject to the approval of the federal district court judge, and the opportunity to contest a petition for a sale is afforded interested parties, as was done in the instant case.

Thus, application of the Deficiency Judgment Act is not

necessary in terms of safeguarding the rights of debtors and creditors. Moreover, such an application would frustrate the intent which Congress evidenced by enacting the bankruptcy act. As noted *supra*, Congress specifically exempted Chapter X sales from the requirement of appraisal found in other bankruptcy court sales in order to better effectuate the ultimate goal of corporate reorganization. Exclusive jurisdiction was vested in the court in which the petition for reorganization had been filed, in order that no proceeding in another court could impede the progress being made toward reorganization in the court of original jurisdiction. In fact, the goal of reorganization of a corporation to meet financial obligations gradually is at variance with the concept of the deficiency judgment, which results in the release of the debtor. For these reasons, we must hold the Louisiana Deficiency Judgment Act inapplicable to sales made pursuant to Chapter X of the federal Bankruptcy Act.

We reverse the decision of the court of appeal and set aside the ruling of the trial court sustaining the exception of no cause of action. We order the case remanded to the trial court for further proceedings. Casting of costs is reserv ..

* * * *

OPINION OF CHIEF JUSTICE SANDERS OF THE
SUPREME COURT OF LOUISIANA

EXCHANGE NATIONAL BANK OF CHICAGO, ET AL.
versus
FRANK SPALITTA, ET AL.

NO. 55,012
SUPREME COURT OF LOUISIANA

SANDERS, Chief Justice (dissenting).

In the present case, both the district court and Court of Appeal held that the deficiency judgment was barred by the failure to comply with the appraisal safeguards of LSA-R.S. 13:4106-4107, the Louisiana Deficiency Judgment Act. The majority of this Court now holds that the Louisiana Deficiency Judgment Act does not apply following a sale on petition of the creditor under Chapter X of the Federal Bankruptcy Act, 11 U.S.C. § 501 et seq. I disagree.

The Louisiana Deficiency Judgment Act provides:

LSA-R.S. 13: 4106:

"If a mortgagee or other creditor takes advantage of a waiver of appraisement of his property, movable, immovable, or both, by a debtor, and the proceeds of the judicial sale thereof are insufficient to satisfy the debt for which the property was sold, the debt nevertheless shall stand fully satisfied and discharged insofar as it constitutes a personal obligation of the debtor. The mortgagee or other creditor shall not have a right thereafter

to proceed against the debtor or any of his other property for such deficiency, except as provided in the next paragraph.

"If a mortgage or pledge affects two or more properties, movable, immovable, or both, the judicial sale of any property so affected without appraisement shall not prevent the enforcement of the mortgage or pledge in rem against any other property affected thereby."

LSA-R.S. 12:4107:

"R.S. 13:4106 declares a public policy and the provisions thereof can not, and shall not be waived by a debtor,but it shall only apply to mortgages, contracts, debts or other obligations made, or arising on or abter August 1, 1934."

The statute expresses the strong public policy of the state. It is well settled that the protection of the statute extends to any type of sale, judicial or private, whereby encumbered property is sold without proper appraisement. See, e.g., Carr v. Lattier, La. App., 188 So. 2d 645 (1966); Universal C.I.T. Corporation v. Hulett, La. App., 151 So.2d 705 (1963); David Investment Co. v. Wright, La App., 89 So. 2d 442 (1956); Futch v. Gregory, La. App., 40 So.2d 830 (1949); Home Finance Service v. Walmsley, La. App., 176 So. 415 (1937).

In an early case applying the Louisiana Deficiency Judgment Act to a private sale, Home Finance Service v. Walmsley, supra, the Court of Appeal stated:

"It is clear from the foregoing that it has been declared to be against the public policy of

this state for any holder of a mortgage to provoke a judicial sale without first having the encumbered property appraised, and that, if such mortgage holder does foreclose without such appraisal, he is prohibited from thereafter proceeding against the mortgagor for any deficiency remaining on the debt.

***

"...While the statute under consideration refers particularly to judicial sales without appraisement, we are of the opinion that the statement of the public policy therein is sufficiently broad to disclose that it was the intention of the lawmakers to place a stamp of disapproval on any practice whereby encumbered property is sold without judicial appraisement, and to sanction the type of agreement, such as the one before us, would be to allow the employment of a device calculated to defeat the underlying purposes which prompted the passage of the law."

The federal courts have soundly held that a sale in a bankruptcy proceeding does not immunize the debt from a state deficiency judgment act. Meadow Brook National Bank v. Massengill, 427 F.2d 1055 (5th Cir. 1970) In re Wilton Maxfield Management Co., 117 F.2d 913 (9th Cir. 1941); Bowl-Opp, Inc. v. Larson, 334 F.Supp. 222 (E.D. La. 1971).

In Bowl-Opp, Inc. v. Larson, supra, a diversity suit in the United States District Court for the Eastern District of Louisiana, the plaintiff sought to recover from the endorsers of a promissory note a deficiency remaining after the sale of

the mortgaged property under an order of the bankruptcy court. In rendering judgment for the endorsers, the court held that the bankruptcy sale did not prevent the application of the Louisiana Deficiency Judgment Act.

In Wilton Maxfield Management Co. v. Crawford, supra, the United States Court of Appeal held that when there was a failure to comply with the California statutes relating to a deficiency judgment in a bankruptcy sale of mortgaged property, the creditor would not be entitled to a deficiency judgment.

In such cases, the state statute regulates the debtor-creditor relationship subsequent to the sale, not the bankruptcy proceeding.

The majority relies upon J. Ray McDermott and Co., Inc. v. Vessel Morning Star, 457 F.2d 815 (5th Cir. 1972). That case, however, is inapposite. It involved a creditor's suit for a deficiency judgment under the Ship Mortgage Act, a federal statute designed to encourage the development of the Merchant Marine. The creditor's security rights thus were created under the federal statute, rather than under state law. The Fifth Circuit Court of Appeal recognized this distinction, when it stated:

> "* * *"to engraft the various nuances of state law onto *federal legislation* would introduce an undesirable lack of uniformity in the interpretation of Congressional enactments' and would impede the harmony and uniformity sought by the Act.***" (Italics mine.)

In my opinion, the Louisiana Deficiency Judgment Act is applicable. Hence, under the Act, the debt "stand[s] fully

satisfied and discharged insofar as it constitutes a personal obligation of the debtor." See LSA-R.S. 13:4106.

In the framework of the Louisiana Civil Code, suretyship is an accessory contract. The Code is clear that when the debt has been discharged as to the principal debtor, the sureties have a real or non-personal defense which they may interpose. LSA-C.C. Arts. 3036, 3060, 3061, 3299; Simmons v. Clark, La. App., 64 So.2d 520 (1953); Brewer v. Foshee, 189 La. 220, 179 So. 87 (1938); Dennis v. Graham, 159 La. 24, 105 So. 87 (1925); Planiol, Civil Law Treatise, Vol. 2, Part 2, No. 2376, p. 352 (La. State Law Inst. trans. 1939); 1 Pothier, *Obligations*, trans. by William David Evans, § 380, p. 307 (1853); 1 Domat, *The Civil Law in Its Natural Order*. Part 1, Book III, Title IV, Art. VIII, p. 62 (William Strahan trans., Cushing ed. 1861)

The Bank, however, classifies the guarantors as co-debtors *in solido*, rather than sureties. Assuming its classification to be correct, the Louisiana Civil Code treats co-debtors *in solido* exactly as it treats sureties in the present situation. Article 2098 provides:

> "A co-debtor in solido, being sued by the creditor, may plead all the exceptions resulting from the nature of the obligation, and all such as are personal to himself, as well as such as are common to all the co-debtors.
>
> "He can not plead such exceptions as are merely personal to some of the other co-debtors."

As the principal debtor has been released by the Louisiana Deficiency Judgment Act, so, too, is his co-debtor *in solido* released. The jurisprudence recognizes that if the

the creditor impairs the solidary co-debtor's subrogation rights, the co-debtor is released. See, e.g., Wilkinson v. Adams, 179 La. 630, 154 So. 630 (1934); Isaacs v. Van Hoose, 171 La. 676, 131 So. 845 (1930); Gay and Co. v. Blanchard, 32 La. Ann. 497 (1880).

I conclude, as did the Court of Appeals, that the deficiency judgment is barred.

For the reasons assigned, I respectfully dissent.

OPINION OF JUSTICE CALOGERO, JUDGE, SUPREME COURT OF LOUISIANA

Filed: Monday, November 3, 1975

SUPREME COURT OF LOUISIANA

EXCHANGE NATIONAL BANK OF CHICAGO
versus
FRANK SPALITTA, ET AL.
NO. 55,012

On Writ of Review to the Court of Appeal, Fourth Circuit, Parish of Orleans.

ON REHEARING

CALOGERO, Justice.

As related in our opinion following the original hearing in this matter, this suit was filed by Exchange National Bank in an attempt to collect money purportedly owed by defendants Ellis Henican, Philip E. James and Frank Spalitta. Defendants were guarantors relative to certain credit extensions to Place Vendome Corporation. Place Vendome Corporation is a subsidiary of Southern Land Title Corporation, both of which are presently in bankruptcy proceedings under Chapter X of the Bankruptcy Act, the chapter providing for corporate reorganization. 11 U.S.C. § 501 *et seq.* Other pertinent facts are related at length in the original opinion and will not be repeated here.

In our original opinion we held that the Louisiana Deficiency Judgment Act [1] is not applicable to sales under Chapter X of the Bankruptcy Act. Accordingly, we reversed the decision of the Court of Appeal and set aside the ruling of the trial court sustaining defendants' exceptions of no cause and no right of action, and ordered the case remanded to the trial court for further proceedings, in effect giving renewed life to Exchange National Bank in its attempt to collect from the guarantors [2] the unpaid portion of the debt.

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1. The rules governing deficiency judgment in Louisiana are set forth in Articles 2771 and 2772 of the Code of Civil Procedure, and La. R. S. 13:4106 and 4107.

2. Defendants are actually solidary co-debtors, along with Place Vendome Corporation, as is evident from the instrument they signed, Continuing Guaranty. They were not simply sureties. The instrument provided as follows:

"Continuing Guaranty . . .

"IN CONSIDERATION of the National American Bank of New Orleans, at my request giving or extending terms of credit to

PLACE VENDOME CORPORATION

hereinafter called debtor, *I hereby give this continuing guaranty* to the said National American Bank of New Orleans, New Orleans, La., hereinafter referred to as the Bank, its transfereees or assigns, *for the payment in full* together with interest, fees and charges of whatsoever nature and kind, of any indebtedness, direct or contingent of said debtor to said Bank, up to the amount of ($1,824,234.00) ONE MILLION EIGHT HUNDRED TWENTY-FOUR THOUSAND, TWO HUNDRED THIRTY-FOUR & NO/100 DOLLARS; whether due or to become due, and whether now existing or hereafter arising; *I hereby bind and obligate myself, my heirs and assigns, in solido with said debtor, for the payment of said indebtedness precisely as if the same had been contracted and was due or owing by me in person,* hereby agreeing to and binding myself, my heirs and assigns, by all the terms and conditions contained in any note or notes signed or to be signed by said debtor, *making myself a party thereto;* and, *waiving all notice, including notice of demand, dishonor, or protest, and all pleas of discussion and division, I agree to pay upon demand at any time to said Bank, its transfereees or assigns, the full amount of said*

(Footnote 2. Continued on Page 19 B.)

We granted a rehearing in this matter upon application of defendants to reconsider their contention that, to preserve the right to deficiency judgment, the sale in the bankruptcy reorganization was required to be (and yet was not) in compliance with Louisiana's Deficiency Judgment Act, as well as to reconsider a contention raised for the first time in defendant's post-argument brief on original hearing that Exchange released the principal debtor, Place Vendome Corporation, without an express reservation of rights against defendant co-debtors, thus effecting a release of defendants under Civil Code Article 2203.

After careful consideration we reinstate the opinion and decree which we rendered originally.

Footnote 2 (Continued)

indebtedness up to the amount of this guaranty, together with interest, fees and charges, as above set forth, becoming subrogated in the event of payment in full by me to the claim of said Bank, its transferees or assigns, together with whatever security it or they may hold against said indebtedness. *The Bank may extend any obligation of the debtor one or more times, and may surrender any securities held by it without notice or consent from me, and I shall remain at all times bound hereby, notwithstanding such extensions, and/or surrender.*

"This guaranty shall continue in full force and effect and shall be terminated only up on receipt by the Bank of written notice of revocation from me, or upon receipt of notice of my death, and that, in either of said events, my liability hereon shall continue as to obligations then existing, and as to any and all renewals or extensions thereof made after said event or events.

"IT IS EXPRESSLY AGREED that this continuing guaranty is absolute and complete, and that acceptance and notice of acceptance thereof by the Bank are therefore unnecessary and they are hereby expressly waived." (Emphasis provided)

Taking up in reverse order defendants' arguments presented upon rehearing, we will first consider defendants' contention that they have been discharged by virtue of plaintiff's remission of conventional discharge of Place Vendome Corporation.

Defendants call our attention to Article 2203 of the Louisiana Civil Code which provides as follows:

> "The remission or conventional discharge in favor of one of the codebtors *in solido,* discharges all the others, unless the creditor has expressly reserved his right against the latter.
>
> "In the latter case, he can not claim the debt without making a deduction on the part of him to whom he has made the remission."

They thereupon direct our attention to the petition filed by Exchange National Bank and its affiliate, National American Bank of New Orleans, in the debtor corporation's reorganization in federal court in which the two banks as joint petitioners sought a sale of mortgaged property.

In that petition seeking the sale of the immovable property, mortgaged to secure the debt which was principally that of Place Vendome Corporation, plaintiff and its affiliated New Orleans bank made the following representations to the federal court:

"16.

"Petitioners further represent that if they are the successful bidders at said proposed sale, they

will, prior to passing of the Act of Sale, to them of said properties:

"(a) Pay to the Trustee the general overhead expenses in connection with the operation of said properties and a reasonable contribution to administrative costs herein;

"(b) Release the debtor-corporation, and any of its subsidiaries, from liability for any deficiency which may become due on the mortgage indebtedness."

This statement of intent to release the debtor corporation from any deficiency which may become due was not carried forward into either the subsequent report of the special master or the district court order confirming that report and authorizing the sale. Nor was there executed thereafter any instrument, prior to the passing of the Act of Sale or otherwise, in which the plaintiff bank did formally comply with the promise contained in the petition.

Petitioners were the successful bidders at the auction sale, for the property was purchased by plaintiff's co-petitioner and local affiliate.

Furthermore plaintiff did not at any time expressly reserve its rights against the guarantors, either in the language employed in the petition or in any document executed thereafter.

Plaintiff takes the position that since the proposal contained in the petition was not thereafter made a prerequisite to the sale of the property, and was not thereafter incorporated in an independent consummating instrument by the plaintiff bank, such promise or commitment in the bank's petition should be considered as irrelevant surplusage.

Defendants' contention, on the other hand, is that the debtor corporation has effectively been released inasmuch as the property was sold at auction in the reorganiation (and purchased by plaintiff's affiliate), the court having been induced to order the sale upon plaintiff's promise to release the debtor corporation from any deficiency. They support their position by reference to a doctrine of preclusion (alternately designated as judicial estoppel), a purportedly applicable legal principle which is frequently employed in the federal jurisprudence. Under this principle "a party may be precluded by a prior position taken in litigation from later adopting an inconsistent position in the course of a judicial proceeding." 1B J. Moore, Federal Practice¶ 0.405, at 765 (2nd ed. 1974). See also In re Double D Dredging Company, 467 F. 2d 468 (5th Cir. 1972) and Scarano v. Central R. Co. of New Jersey, 203 F.2d 510 (3rd Cir. 1953). Defendants contend that the same result is dictated by principles of Louisiana law, citing Article 2291 of the Civil Code (judicial confession), Johnson v. Markx Levy & Bro., 109 La. 1036 (1902); Williams v. Gilkeson-Sloss Co., 45 La.Ann. 1013 (1893); Gaudet v. Gauthreaux, 40 La. Ann. 186 (1888); Wright, Williams & Co. v. The Trustees of the Bank of the United States, 7 La.Ann. 123 1852 ; Gremillion v. Dubea, 108 So. 2d 238 (La.App. 2nd Cir. 1958); and Gulf States Finance Corp. v. Moses, 56 So.2d 221 (La.App. 2d Cir. 1951).

Although the foregoing presents an interesting and perhaps close legal issue, there are two reasons why we find it inappropriate and unnecessary to resolve it at this stage of the litigation. One reason for our decision is that defendants have not filed an answer which incorporates the affirmative

defense of conventional or other discharge. See La. C.C.P. Art. 1005 which requires pleading of affirmative defenses including "extinguishment of the obligation in any manner."

Furthermore, the only matter which we have been properly called upon to review in this litigation is the validity of the judgment of the district court and Court of Appeal dismissing plaintiff's petition on exceptions of no cause and no right of action, upon a finding that non-compliance with Louisiana's Deficiency Judgment Act prevents plaintiff's recovering from defendants.

The only reason documents relating to plaintiff's purported remission or conventional discharge of Place Vendome Corporation were even included in the record is that they were attached to an affidavit filed by counsel for defendants in connection with their exceptions of no cause and no right of action.

Although we may have the right, in the interest of expediting termination of this litigation, to decide this issue which is not procedurally before us,[3] we find the state of the record with respect to this conventional discharge matter incomplete.

When and if an affirmative defense of conventional discharge is urged, such evidence as may be presented will likely be admissible. This evidence might include testimony about why the promise to release the debtor corporation was a part of the bank's petition and why it was excluded from the master's report and trial court's order authorizing the sale.

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3. Plaintiff's counsel has not specifically protested defendants' raising this issue and has argued the demerit of defendants' position.

For these reasons,we do not resolve the issue not properly before us in this litigation concerning whether plaintiff has remitted or conventionally discharged Place Vendome Corporation from any deficiency judgment, and if so, whether defendants, solidary co-debtors with Place have likewise been discharged under the provisions of Article 2203 of the Civil Code.

With respect to defendants' initial argument on rehearing, that this Court erred in its original opinion when we found Louisiana's Deficiency Judgment Act not applicable to sales under Chapter X of the Bankruptcy Act, we have studied that contention anew and find it to be without merit.

For the reasons more fully set out in that original opinion we conclude anew that Louisiana's Deficiency Judgment Act is not applicable to sales under Chapter X of the Bankruptcy Act and that plaintiff's petition in the district court should not for that reason have been dismissed.

Accordingly, our opinion and decree upon original hearing are reinstated. We reverse the decision of the Court of Appeal and set aside the ruling of the trial court sustaining the exceptions of no cause and no right of action. We order the case remanded to the trial court for further proceedings.

OPINION OF LOUISIANA COURT OF APPEAL
FOURTH CIRCUIT

EXCHANGE NATIONAL BANK OF CHICAGO	*	NO. 6201
	*	COURT OF APPEAL
V.	*	FOURTH CIRCUIT
FRANK SPALITTA, ET ALS		STATE OF LOUISIANA

* * * *

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA DIVISION "G", NO. 478-792, HON. PAUL GAROFALO, JUDGE

* * * *

JAMES C. GULOTTA
JUDGE

* * * *

(Court composed of Judges L. Julian Samuel, James C. Gulotta and John C. Boutall.)

ROOS AND ROOS
LEO S. ROOS
For Plaintiff-Appellant

HENICAN, JAMES & CLEVELAND
C. ELLIS HENICAN, JR.
CARL W. CLEVELAND
For Defendants-Appellees

AFFIRMED

(Filed: May 10, 1974)

This is a suit for a deficiency judgment against accommodation guarantors in the sum of $1,376,113.00[1] including the unpaid balance, attorney fees, interest and costs on a loan made to Place Vendome Corporation, a subsidiary of Southern Land Title Corporation, in the total amount of $1,007,890.50. Negotiations for the loans were made by National American Bank. Plaintiff advanced a greater part of the sum loaned by the National American Bank and thereby participated in making the loan.[2]

Plaintiff alleged the indebtedness is represented by two hand notes and a collateral mortgage and collateral mortgage note dated February 21, 1966. Real property in the French Quarter area in New Orleans belonging to the debtor secured the payment of the loan. The debtor defaulted. Subsequently, Place Vendome was placed in bankruptcy with its parent corporation, Southern Land Title Corporation. The real property was sold at public auction in the bankruptcy proceedings pursuant to and in accordance with an order of the Federal District Court for the sum of $255,000.00. The property was purchased by the plaintiff herein. This suit was brought seeking a deficiency judgment for the unsatisfied part of the loan and is directed against the defendants as guarantors of the notes and as continuing guarantors of the indebtedness of the Place Vendome Corporation.[3]

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1. Second Supplemental Petition increases the amount to $1,458,557.84.

2. Suit was originally instituted by National American Bank; however, this suit was subsequently voluntarily dismissed with prejudice on December 7, 1972.

3. Defendants executed a continuing guarantee in favor of plaintiff bank up to the sum of $1,824,234.00 in consideration of the credit extended to Place Vendome Corporation.

The trial judge, in dismissing plaintiff's suit, maintained exceptions of no cause and of no right of action. In written reasons, the judge stated the requirements of the Louisiana Deficiency Judgment Act were not met because of lack of notice of seizure on defendants and because of lack of notice for the appointment of appraisers. Accordingly, he reasoned, plaintiff is not entitled to a deficiency judgment. Plaintiff appeals. We affirm.

Plaintiff, in seeking reversal, contends

(1) The Deficiency Judgment Act is not applicable to a separate contract of continuing guarantee, that the act is applicable to a principal obligor but not to guarantors, as in the instant case:

(2) The sale was ordered in the bankruptcy reorganization by the United States District Court and under such circumstances, neither the Louisiana Deficiency Judgment Act nor the Louisiana law on executory process is applicable.

Plaintiff claims defendants voluntarily surrendered the property to the bankruptcy court for adjudication and they cannot now be heard to complain that the bankruptcy sale was not in compliance with the Louisiana Act. Furthermore, plaintiff argues if the Louisiana Deficiency Judgment Act were applicable, there would be no uniformity of bankruptcy proceedings. Plaintiff further points out that it did not provoke the sale and had no control over the proceedings in the United States District Court. Exchange further argues the sale was ordered subject only to a minimum bid of 75 percent of the appraised value, thus giving more protection to the debtor than the Louisiana act which stipulates that no sale

can be made for less than two-thirds of the appraised value.[4]

Defendants, on the other hand, claim the Deficiency Judgment Act is applicable to guarantors and endorsers as well as to principal obligors. They further argue the sale was provoked by the creditors in the bankruptcy proceedings under conditions as set forth in the bank's petition for the sale and that the trustee's petition was withdrawn in favor of the plaintiff's petition. Accordingly, they insist plaintiff erred in not setting conditions for the sale in compliance with the Louisiana Act. Defendants finally insist that the Louisiana Deficiency Judgment Act is applicable to sales in bankruptcy and that there was failure of compliance with the Act. Specifically, defendants claim no notice of seizure was served on them;[5] no notice was given to the debtors to ap-

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4. LSA-C.C.P. art. 2336 reads as follows:

"The property shall not be sold if the price bid by the highest bidder is less than two-thirds of the appraised value. In that event, the sheriff shall re-advertise the sale of the property in the same manner as for an original sale, and the same delay must elapse. At the second offering, the property shall be sold for cash for whatever it will bring, except as provided in Article 2337."

5. LSA-C.C.P. art. 2721 reads as follows:

"The sheriff shall seize the property affected by the mortgage or privilege immediately upon receiving the writ of seizure and sale, but not before the expiration of the delay allowed for payment in the demand required by Article 2639, unless this demand has been waived.

"The sheriff shall serve upon the defendant a written notice of the seizure of the property."

LSA-C.C.P. art. 2293 reads as follows:

"After the seizure of property, the sheriff shall serve promptly upon

(Footnote 5 - Continued on Page 29 B)

point an appraiser;[6] no appriaser was, in fact, appointed by the debtor; no oath was filed by the appraiser appointed by the court;[7] and finally, no appraisal was delivered to the

(Footnote 5 - Continued)

the judgment debtor a written notice of the seizure and a list of the property seized, in the manner provided for service of citation."

LSA-C.C.P. art. 2331 reads as follows:

"Notice of the sale of property under a writ of fieri facias shall be published at least once for movable property, and at least twice for immovable prperty, in the manner provided by law. The court may order additional publications.

"The sheriff shall not order the advertisement of the sale of the property seized until three days, exclusive of holidays, have elapsed after service on the judgment debtor of the notice of seizure, as provided in Article 2293."

6. "LSA-R.S. 13:4363 reads as follows:

"A. Not less than three days, exclusive of holidays, before the sale of seized property, the sheriff shall serve a written notice on the debtor, in the manner provided for the service of a citation, directing each to name an appraiser to value the property and to notify the sheriff of his appointment prior to the time stated in the notice, which shall be at least twenty-four hours prior to the time of the sale.

"B. If there are two or more debtors or seizing creditors and these parties cannot agree as to which should act as or appoint an appraiser, and in any case where an appraisal is required prior to the judicial sale and which is not otherwise provided for in this Section, on the ex parte application of the sheriff or of any interested party, the court shall designate the party to act as or appoint the appraiser, and the notice required by Sub-section A of this Section shall be served on the party so designated."

7. LSA-R.S. 13:4365 reads as follows:

"The appraisers shall take an oath to make a true and just appraisement of the property.

(Footnote 7 - Continued on Page 30 B)

United Staees Marshall before the sale. Accordingly, defendants claim the sale was made without benefit of a valid appraisal. Defendants insist, therefore, plaintiff is not entitled to a deficiency judgment. Defendants rely on LSA-R.S. 13:4106 and LSA-R.S. 13:4707.[8]

Applicability of Louisiana Act to Guarantor

We reject plaintiff's argument that the Deficiency Judg-

(Footnote 7 - Continued)

"If the appraisers cannot agree, the sheriff shall appoint a third appraiser, who shall also be sworn, and whose decision shall be final.

"The property seized must be appraised with such minuteness that it can be sold together or separately.

"The appraisers shall reduce their appraisement to writing, sign it, and deliver it to the sheriff."

8. LSA-R.S. 13:4106 reads as follows:

"If a mortgagee or other creditor takes advantage of a waiver of appraisement of his property, movable, immovable, or both, by a debtor, and the proceeds of the judicial sale thereof are insufficient to satisfy the debt for which the property was sold, the debt nevertheless shall stand fully satisfied and discharged insofar as it constitutes a personal obligation of the debtor. The mortgagee or other creditor shall not have a right thereafter to proceed against the debtor or any of his other property for such deficiency, except as provided in the next paragraph.

"If a mortgage or pledge affects two or more properties, movable, immovable, or both, the judicial sale of any property so affected without appraisement shall not prevent the enforcement of the mortgage or pledge in rem against any other property affected thereby."

LSA-R.S. 13:4707 reads as follows:

"R.S. 13:4706 declares a public policy and the provisions thereof can not, and shall not be waived by a debtor, but it shall only apply to mortgages, contracts, debts or other obligations made, or arising on or after August 1, 1934."

ment Act is applicable only to principal obligors and not to endorsers and guarantors. The court in *Simmons v. Clark*, 64 So. 2d 520 (La. App. 1st Cir. 1953), when confronted with the question, where the guarantor executed a note and mortgage as collateral for the principal indebtedness (similar to the instant case), concluded since a deficiency judgment could not be obtained against the principal obligor, no such judgment could be obtained against the guarantor. In that case, the sale was made without benefit of appraisal. The court in applying the articles of the Civil Code on suretyship[9] stated at page 523:

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9. LSA-C.C. art. 3035 reads as follows:

"*Suretyship* is an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation, if the debtor does not."

LSA-C.C. art. 3059 reads as follows:

"The obligation which results from a suretyship, is extinguished by all the different modes in which other obligations may be extinguished; but the confusion which results in case the principal debtor or his surety should become heirs one to the other does not extinguish the action of the creditor against the person who has become the surety of the surety."

LSA-C.C. art. 3060 reads as follows:

"The surety may oppose to the creditor all the exceptions belonging to the principal debtor,and which are inherent to the debt; but he can not oppose exceptions which are personal to the debtor."

LSA-C.C. art. 3061 reads as follows:

"The surety is discharged when by the act of the creditor, the subrogation to his rights, mortgages and privileges can no longer be operated in favor of the surety."

> "* * *Under the laws of suretyship, the surety here may interpose the same defense which is available to the principal debtor, as there are no personal defenses present. Furthermore, by the provisions of Article 3061 of the LSA-Civil Code, the surety is discharged from his obligation when, by the act of the creditor, the subrogation to his rights, mortgages and privileges can no longer be operated in favor of the surety."

The court went on to say also at page 523:

> "* * *Under the laws of suretyship this defense of the principal obligor now operates in favor of the sureties.* * *"

See also *C.I.T. Corporation v. Rosenstock*, 205 So. 2d 81 (La. App. 4th Cir. 1967).

It is clear under the *Simmons* case, therefore, that the Deficiency Judgment Act applies not only to the principal obligor but to the guarantor when the defense interposed by the principal obligor is not personal to the debtor.[10]

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10. In the *Simmons* case, the personal defenses are defined as infancy, interdiction, coverture, lunacy, bankruptcy and the like. While bankruptcy is listed here, the personal defense referred to in *Simmons* is the discharge from indebtedness which is a personal benefit to the bankrupt. This personal defense, i.e., the discharge in bankruptcy to the debtor, is one which would not relieve the surety. The surety here does not urge the discharge in bankruptcy of the debtor as the basis for his release. The reason in this instant case is the making of a judicial sale without compliance with the Deficiency Judgment Act.

Plaintiff Provoked Sale and Set Conditions

We reject also plaintiff's suggestion that the creditor cannot be bound by the Provisions of the Louisiana Act when the debtor voluntarily surrendered the immovable property to the bankruptcy court for adjudication and that it (the creditor) had no control over the proceedings in the United States District Court. It is true, as contended by plaintiff, that the trustee petitioned the court in the bankruptcy proceeding to sell the property. However, plaintiff also petitioned for the sale of the property in the bankruptcy proceedings and in that petition set forth the conditions for the sale. At a hearing before the Referee in Bankruptcy on the petition of the trustee and the petition of plaintiff to sell the property, the attorney for the trustee stated:

> "The trustee now feels, and for the reasons particularly stated in both the banks' petition, that this is the most expeditious manner of disposing of these properties, and particularly for the reasons stated in said petition, has no objection to the property being disposed of in that manner, and will make the trustee available for questioning. Perhaps since the banks are now the *moving parties*, they should proceed. The trustee would actually formally *withdraw* his petition for sale, and in lieu thereof we will have the petition of the banks requesting that this sale be made." (emphasis ours)

By order of the United States District Court, dated July 18, 1969, the property was ordered sold under substantially the same conditions set forth in plaintiff's petition for sale filed in the bankruptcy proceedings. The property was adjudicated by public auction on September 4, 1969 for the sum of $255,000.00 to the National American Bank,

the highest bidder, one of the creditors along with the plaintiff.[11] Exchange National Bank cannot now be heard that it did not provoke the sale nor control the conduct of the proceedings before the United States District Court. Exchange provoked the sale and set forth in their petition conditions of the sale which were subsequently substantially followed by the federal court. See *Universal C.I.T. Credit Corporation v. Hulett*, 151 So.2d 705 (La. App. 3rd Cir. 1963), where the court stated at page 707:

> "* * *Under the stringent policy provisions of the Deficiency Judgment Act as interpreted, a mortgage creditor is absolutely barred from a deficiency judgment where he provokes a sale, judicial or private, without the benefit of appraisement.* * *"

Noncompliance with Louisiana Deficiency Judgment Act

We now turn to a consideration of whether there was compliance with the deficiency Judgment Act. The trial judge correctly observed in written reasons when he stated:

> "It appears evident that Exchange National Bank did not comply with the Louisiana Deficiency Judgment Act, particularly with regard to the service of notice of seizure and notice for the appointment of two appraisers."

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11. The sale was made in compliance with the United States District Court order. The court stated the sale must be for not less than 75 percent of appraisal. Court appointed appraisal was $333,120.00. Sale price was in excess of 76 percent.

There is no evidence that service of a notice of seizure was effected or that notice to the dentor for the appointment of an appraiser was given or that an oath of the appraiser was filed as required in a judicial sale under LSA-R.S. 13:4363 and LSA-R.S. 13:4365. In such instances, when the requirements for a judicial sale are not met, a creditor cannot avail himself of the benefit of a deficiency judgment under LSA-R.S. 13:4106 and LSA-R.S.13:4107[12] the Deficiency Judgment Act.

In *Margolis v. Allen Mortgage & Loan Corporation*, 268 So. 2d 714 (La. App. 4th Cir. 1972), involving executory process, we stated that this is a harsh procedure and unless the deficiency judgment statutes are strictly followed in every particular, the creditor is not entitled to a deficiency judgment. While we are not concerned here with executory process, nevertheless, whether it be a sale under executory process or a judicial sale under different circumstances the requirements of the deficiency judgment act must be stringently followed before one may avail himself of its provisions.

The court in *Bourgeois v. Sazdoff*, 209 So.2d 320 (La. App. 4th Cir. 1968) held that a deficiency judgment could not be obtained because of the defective oath of one of two appraisers.

It is clear, therefore, that there was failure of compliance with the Deficiency Judgment Act in the instant case.

Louisiana Act is Applicable to Sale in Bankruptcy

However, plaintiff argues that the act is not appli-

12. See Footnote 8, supra, for wording of these provisions.

cable to judicial sales resulting from bankruptcy proceedings. In support of this argument, it cites *J. Ray McDermott & Co., Inc. v. Vessel Morning Star*, 457 F.2d 815 (5th Cir. 1972), where the court held that the creditor (shipbuilder) was entitled to a deficiency judgment when the foreclosure and sale is brought under the Ship Mortgage Act of 1920[13] without the necessity of compliance with a state deficiency judgment law. The result in that case, however, is not persuasive here. In the *McDermott* case, supra, the court was concerned with a mortgage executed in accordance with a federal act passed for the purpose of encouraging the development of the American Merchant Marine. In the instant case, we are concerned with rights of a creditor, debtor and guarantor conferred under Louisiana Statutes involving immovable property located in Louisiana. It is more reasonable that Louisiana law be applied and followed in such instances. We are more persuaded by the Court's decision in *Bowl-Opp, Inc. v. Larson*, 334 Fed. Supp. 222 (1971), where the court held that an order for the sale of mortgaged realty by the federal court in a bankruptcy proceeding did not prevent the application of Louisiana statutes which prohibits a deficiency judgment if the sale of mortgaged property is made without appraisement. In that case, the court rejected the contention made by the mortgage holder, that because a stipulation was entered into between the creditor and the trustee, (1) to disclaim the property and to allow the property to be sold under conditions to be set by a special master, (2) and to release the bankrupt from liability for debt, the Louisiana Deficiency Judgment Act was not applicable to the endorser because the creditor did not provoke the sale. In *Bowl-Opp*, as in the instant case, the creditor had petitioned the court to disclaim the property from the reorganization

13. 46 USCA 911 et seq.

proceeding.

The stipulation in *Bowl-Opp* released the makers of the note from a deficiency judgment; nevertheless, all rights were reserved to the creditors to pursue any rights that they may have against the endorsers. In *Bowl-Opp*, the deficiency judgment was sought against the endorsers as in the instant case, and the sale was also made without the benefit of appraisement. We are in agreement with the result reached in the *Bowl-Opp* case. See also *Wilton Maxfield Management Co. v. Crawford*, 117 F.2d 913 (9th Cir. 1941), where the court held that a deficiency judgment could not be obtained by mortgage creditors after sale in bankruptcy when there was failure of compliance with the requirement of a California Statute relating to deficiency judgments.

We hold, therefore, that the Louisiana Deficiency Judgment Act is applicable to guarantors where property is sold at a public sale by order of the bankruptcy court where the sale is provoked by the mortgage holder and where the defense interposed by the principal obligor is not personal to him.[14] In such instances, the mortgage creditor cannot obtain a deficiency judgment against the guarantors where there is failure of compliance with the Louisiana Deficiency Judgment Act. Because of failure of compliance by Exchange, it is not entitled to obtain a deficiency judgment against the defendants. Accordingly, the judgment is affirmed.

AFFIRMED

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14. See footnote 10, supra.

REASONS FOR JUDGMENT

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 478-792 DIVISION "G" DOCKET 4

Filed: March 12, 1973

EXCHANGE NATIONAL BANK OF CHICAGO
VS.
FRANK SPALITTA, ET ALS

REASONS FOR JUDGMENT

It appears evident that Exchange National Bank of Chicago did not comply with the Louisiana Deficiency Judgment Act, particularly with regard to the service of notice of seizure and notice for the appointment of two appraisers.

Exchange National Bank of Chicago contends that the proceedings in the United States District Court were "via ordinaria" and not "via executiva" and that, hence, the Deficiency Judgment Act has no application.

In either case, a notice of seizure and a notice for the appointment of appraisers are required. (In executory proceedings, see, Deficiency Judgment Act. LSA R.S. 13:4106 and C.C.P. Art. 2771). In ordinary proceedings after judgment by writ of fifa, see, C.C.P. Art. 2293:

"After the seizure of property, the Sheriff *shall* serve promptly upon the judgment debtor a written notice of seizure and a list of the property seized, in the manner provided for service of citation." (emphasis supplied)

In addition, C.C.P. Art. 2332 provides that:

"The property seized must be appraised according to law prior to the sale."

Accordingly, whether Exchange National Bank of Chicago was proceeding "via ordinaria" or "via executiva", in either case, according to the above authorities, notice of seizure and notice to appoint appraisers were sacramental prerequisites to a deficiency judgment.

The exceptions of no cause and no right of action of C. Ellis Henican, Philip E. James and Frank Spalitta will be maintained.

New Orleans, Louisiana; March 12, 1973.

s/ Paul P. Garafalo
JUDGE

JUDGMENT OF CIVIL DISTRICT COURT
PARISH OF ORLEANS, STATE OF LOUISIANA

STATE OF LOUISIANA
CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

No. 478-792 DIVISION "G" DOCKET No. 4

NOTICE OF JUDGMENT

EXCHANGE NATIONAL BANK OF CHICAGO
Versus New Orleans, Louisiana
FRANK SPALITA, ET AL

TO: Mr. Leo S. Roos
Mr. C. Ellis Henican, Jr.
Mr. James J. Morrison
ATTORNEYS FOR PARTIES

DEAR SIRS:

In accordance with Article 1913 C.C.P., you are hereby notified that the Court has on March 12th 1973, judgment rendered and signed in the above cause.

FILED: March 13, 1973

ENTERED - G - MINUTES

A note is being made on the docket of the mailing of this notice to the Counsel of record for each party.

Mailed March 13th, 1973.

Yours very truly,
s/ (Signature Illegible)
Deputy Clerk, Civil District Court
Minute Clerk Division "G"

In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1086

C. ELLIS HENICAN
AND
PHILIP E. JAMES
Applicants

versus

EXCHANGE NATIONAL BANK OF CHICAGO
Respondent

OPPOSITION TO APPLICANTS' APPLICATION FOR WRIT OF CERTIORARI

ROOS AND ROOS
LEO S. ROOS
1504 First National Bank
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AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 75 - 1086

C. ELLIS HENICAN
AND
PHILIP E. JAMES
Applicants

vs.

EXCHANGE NATIONAL BANK OF CHICAGO
Respondent

Respondent, EXCHANGE NATIONAL BANK OF CHICAGO prays that Petitioners' Application For Writ of Certiorari to review the Judgment of the Supreme Court of Louisiana of March 31, 1975, and the Judgment on Rehearing entered on November 3, 1975, be refused and denied.

OPINIONS

The opinions appealed from are attached to Applicant's Brief Appendix B at page 1B through 17B and are not repeated herein.

JURISDICTION

Appellants have attempted to invoke jurisdiction under 28 U.S.C. 1257 (3) which reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

". . .(3) by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or *where the validity of a State statute is drawn in question on the ground of it being repugnant to the constitution*, treaties, or laws of the United States or where any title, right, privilege or immunity is specifically set up to claim under the constitution, treaties, or statutes of commisssion held or authority exercised under the United States." " [Emphasis added]

It would appear from the outset that Applicants' reliance upon this statute for jurisdiction would not be satisfactory to permit review by this Honorable Court for the following reasons:

There is no issue relative to the invalidity or the inability of the United States District Court sitting as a reorganization tribunal to order a sale of the corporation debtor's property upon any terms, conditions and circumstances of the Court's discretion nor did that issue arise in any Louisiana Court. In the case at bar the cause of action was for recovery under a separate continuing guaranty 18 months prior to any sale of the debtor corporation's property in relation to the debt. As a matter of fact, Applicants throughout the case and as late as their application for Rehearing in the Louisiana Supreme Court admitted there was no Federal question relative to the sale:

"(i). False Conflict. The case before the Court (La. Supreme Court) involved, at most, a "false conflict". No one has attacked and no one can attack the sale of the property by

the Federal Court. There is no effect on the bankruptcy case or on the reorganization proceedings, whatever this Court holds. There is no reason to find a conflict between the two jurisdictions where none is necessary. This has been recognized by all Federal Courts considering problems of this kind."

APPLICATION FOR REHEARING TO LOUISIANA SUPREME COURT ON BEHALF OF C. ELLIS HENICAN AND PHILIP E. JAMES
Page 6.

Applicants have sought under the Louisiana Court system an interpretation of the Louisiana Deficiency Judgment Statute which would bar the separate debt in the separate State Court lawsuit.

The Louisiana Court has upheld its own statute and interpreted it as not relating to, or being applicable to sales under Chapter X of the Bankruptcy Statute.

The upholding of Applicants' choice of statute to invoke jurisdiction could only be successful if Applicant were advocating the unconstitutionality of the Louisiana Statute. In the present case if he were successful in so having the Louisiana Deficiency Judgment Statute declared unconstitutional, a prerequisite under the jurisdiction of 28 U.S.C. 1257 (3), there would be no valid grounds to impede the progress of Respondent's proceeding on the separate guaranty. Applicants have clearly admitted there is no Federal question as to the sale in bankruptcy.

It would, therefore, seem that by this jurisdictional reference alone Applicants have sequarely placed themselves on the horns of a dilemma.

If the statute is declared unconstitutional, Respondent's rights are unrestricted and unhampered; on the other hand, if there is no question as to unconstitutionality, there is not adequate jurisdictional grounds before this Court on this statute invoked. (28 U.S.C.# 1257 [3]).

In either event Applicants' own evaluation and admission indicate that there is no Federal issue in this case and the Louisiana Supreme Court on both occasions has interpreted its own Statute as being inapplicable to the Federal question.

QUESTIONS PRESENTED BY APPLICANT

1. Whether a state's Deficiency Judgment Act is in conflict with the provisions of Chapter X of the Federal Bankruptcy Act.

2. Whether or not Article VI of the United States Constitution prevents the application of a state's Deficiency Judgment Act to an obligation, involving a principal debtor which is under the jurisdiction of the Federal Bankruptcy Court pursuant to Chapter X of the Federal Bankruptcy Act.

3. Whether the Federal Bankruptcy Act permits application of the laws of the various states, which laws are not in conflict with the purposes and policy of the Federal Bankruptcy Act.

RESPONSE TO THE QUESTIONS PRESENTED

1. In examining the statute relied upon so heavily by

Applicants, it is evident to see that it was never addressed to the question presented by Applicants:

> R.S 13: § 4106. Deficiency judgment prohibited if sale made without appraisement
>
> If a mortgagee or other creditor *takes advantage of a waiver of appraisement of his property*, movable, immovable, or both, by a debtor, and the proceeds of the judicial sale thereof are insufficient to satisfy the debt for which the property was sold, the debt nevertheless shall stand fully satisfied and discharged insofar as it constitutes a personal obligation of the debtor. The mortgagee or other creditor shall not have a right thereafter to proceed against the debtor or any of his other property for such deficiency, except as provided in the next paragraph.
>
> If a mortgage or pledge affects two or more properties, movable, immovable, or both, the judicial sale of any property so affected without appraisement shall not prevent the enforcement of the mortgage or pledge in rem against any other property affected thereby. As amended Acts 1952, No. 20, § 1; Acts 1960, No. 32, §1. [Emphasis Added]

It is obvious that the first controlling provision relates to the mortgage creditor taking advantage of the "waiver of appraisement".

In the case at bar the Federal Judge set the terms and condition *and* ORDERED AN APPRAISAL though he clearly was not obligated to so do.

The other obvious if more subtle description of the transaction is that whatever proceeds were to be derived from this sale would not have been for the benefit of, nor would they have gone to, the creditor. They did go to benefit the Debtor's estate and regardless of how much had been realized from the Marshall's sale of the property it would only have gone to defray the Trustee's expenses and the balance was devoted to the Debtor's general estate. As a matter of fact the creditor's position would have only diminished because he would then be an ordinary general creditor for his debt once his specific security was sold.

2. Applicants second question seems to address itself to the constitutionality of the Louisiana Deficiency Judgment Statute and if this question was before this Court and answered in the negative Applicants' position would be defeated entirely; on the other hand, if this Court were to hold the Statute as constitutional the interpretation by the Louisiana Supreme Court and by Applicants' numerous statements in brief previously quoted would indicate no conflict with the Federal question.

3. Applicants' third question would seem not to be proper before this Court as the Louisiana Supreme Court has held on both occasions that the Statute does not conflict with the sales under Chapter X.

If this Court were to hold otherwise, it would indicate the intention to engraft separate terms and conditions for sales in each jurisdiction and the basic premise of all Federal law, uniformity, would be ill served. One could envision the same creditor losing rights under separate contractural guarantees in each of many separate jurisdictions and each one for reasons beyond his control but exclusively determined by the discretion of the reorganization tribunal.

This conclusion would certainly seem to tear the consistant framework of the Bankruptcy laws and create undue havoc and chaos where these last 45 years the Reorganization Statute has attempted to unify results in each jurisdiction.

STATEMENT

This case is the culmination of a ten year struggle in a separate suit on a continuing guaranty which was executed by the two senior partners of a well established law firm, which firm is the attorney of record for Applicants.

There is no question that the guaranties were scrupulously examined, deeply evaluated, and executed after due care.

The guaranty is attached hereto as Appendix "A".

The guaranty was given to induce Respondent and its New Orleans lead bank to lend money to a corporation for the improvements of property located in the New Orleans French Quarter.

Thus a sum in excess of $1,000,000.00 was advanced for the improvements of the property on February 21, 1966, -- not one penny was ever spent on the project for any purpose or for the purposes for which the loan was granted, and after these ten (10) years not one penny has ever been repaid on the loan by either the corporation or the Applicants. As a matter of fact, four months after the mortgage and guaranty were signed, Applicants who were officers and directors of the Debtor corporation prepared a secret counter letter transferring the property surreptitiously in obvious violation of the mortgage, the counter letter was recorded in

Orleans Parish in Conveyance Office Book 678-A in September, 1966, and these facts were not revealed for two years after the reorganization proceedings were filed.

The guaranties, the subject of this litigation, were separate agreements in which the Applicants were solidary co-debtors with the corporation, and during the pendency of the corporate reorganization, this separate suit was commenced on May 31, 1968, in State Court prior to any sale by the Trustee of the corporate Debtor's property.

Though there were many grounds for default no foreclosure suit was filed and in fact the stay order has been in effect for nine years.

Applicants argued many motions attempting to stay the Court action, citing as a reason, the separate corporate reorganization proceedings in Federal Court.

On September 18, 1968, the Trustee petitioned the Court that the property was not necessary for the successful reorganization and was a huge current financial drain of the Debtor estate. The property had become run down, dilapidated, and only served to house wandering vagrant trespassers in the French Quarter of New Orleans; it was condemned by the City as a hazard to the general health and welfare of the public.

Pursuant to this the Trustee petitioned the Court to sell the property at Marshall's sale to prevent further drain on the dwindling financial situation of the corporation.

After the Trustee's request for sale of the property was first heard by the Bankruptcy Referee sitting as a Special Master thirteen (13) months elapsed with no action taken as

the helplessness of the reorganization became more and more evident.

Finally, the Respondent joined in the petition for the Court to amend the Trustee's petition to require an appraisal and that at least 75% of that appraised value be a minimum acceptable bid. It was also requested that the secured creditors be permitted to bid up to the value of their mortgage, all of which conditions were consistent with the accepted Bankruptcy practice, particularly for sales under Chapter X.

> [Although this was the Trustee's original request for sale and not a foreclosure the conditions recommended exceeded those which would have been necessary under the Louisiana Deficiency Judgment Statute requiring only two-thirds of the appraised value be bid in order for a deficiency judgment to be later obtained.]

It should be observed that at the time of the sale of the property the suit for recovery on the continuing guaranty had been in State Court for over two years.

Applicants herein were cited to the Referee's hearing and chose not to attend and in fact despite multiple notices never appeared in the reorganization at all and made no attempts to protect their interests by bidding on the property which was later sold.

The Referee's recommendation was presented to the United States District Judge and upon a hearing after due notice the acceptance of the Referee's recommendation was affirmed.

No opposition to the recommendation was received and the Court set notices of a Hearing to order the Trustee's request for Marshall's sale of the property.

Again, no opposition was received and the Court ordered the Marshall to sell the property on the conditions recommended by the Special Master.

At the Marshall's sale the successful bid was an amount which represented 76.45% of the appraised value set by the United States District Court-ordered appraiser who in fact had been the original appraiser for the Debtor Corporation when it originally obtained the loan from Respondent.

The amount of the successful bid exceeded the 75% ordered and far exceeded the 66 2/3% which would have been required by the Louisiana Deficiency Judgment Statute.

Respondent amended its petition for recovery on the special continuing guaranty to permit a dollar offset against the debt of the actual amount recovered by the Debtor's estate, and have continued Respondent's suit for recovery.

Applicants attempted to defeat the State Court's recovery on the grounds that the Louisiana Deficiency Judgment Statute R. S. 13:4106 [See Applicants' Brief pages 2A and 3A] had not been complied with in the sale of the Debtor corporation's assets and hence recovery against the separate continuing guarantors was released.

At first their position was that there was no appraisal ordered by and submitted to the United States District Court although the appraisal was delivered to the Federal Judge one month prior to the Marshall's sale. Applicants'

position was to deny the existence of that appraisal as lawful even though in a reorganization proceeding the Judge is permitted to order a sale without any appraisal and without any limitation on the terms or conditions thereto. [The theory being that to save a corporation stringent means might be necessary.] Nevertheless, with obvious regard for the Louisiana provisions the United States District Judge ordered terms in excess of those that may have been required under a Louisiana foreclosure proceeding.

It should also be highlighted that this was not a foreclosure sale ordered by, for, or to the benefit of the creditors, but was a sale to divest the reorganizing Trustee of a financial burden and drain on the assets of the Debtor's estate.

To equate the Marshall's sale in this circumstance with a creditor's foreclosure would be an obvious folly of ignoring the exclusive all-encompassing power, authority and jurisdiction granted to a United States District Court sitting as a corporate reorganization tribunal with exclusive power and authority over the Debtor corporation.

That power and authority is raw, practically unlimited and exclusive and is rarely for the benefit of the creditors, and then only incidentally if it primarily benefits the Debtor's estate.

Applicants in their arguments to the Louisiana Supreme Court urged that the United States District Court should not be permitted to rule on or to govern the provisions of the Louisiana Deficiency Judgment Statute – that power should be exclusively the authority of the Louisiana Court System and the Supreme Court took that argument at face value. [Louisiana Supreme Court Judgment of March 31, 1975,

Applicants.' Brief - Page 7 B]

It was the Louisiana Supreme Court which answered that allegation by stating in their original Judgment that they considered themselves adequate to determine that the United States District Court had *not* violated the provisions of the Deficiency Statute and had concluded correctly.

In so holding they decided after due deliberation that the Deficiency Judgment Statute did not apply to sales under Chapter X in Bankruptcy (Reorganization).

Shortly thereafter, the Associate Justice who had written the opinion, Justice Mack Baham, retired from the Louisiana Supreme Court and the Court granted a rehearing. After due deliberation with another Judge sitting, the Court again upheld the original decision 4 - 3 and Applicants have applied herein for relief.

It is rather unusual that the Applicants would include an argument as to number of judges who have passed on the case as it is not the number of judges but the rank and priority of the last Court. Nevertheless, even that citation of numbers was incorrect. The Bankruptcy Referee sitting as a Special Master was the original party recommending the course of action after two hearings over an 18-month period.

The Federal District Court heard and ordered the sale.

The State District Judge granted Applicants a Motion to Dismiss which was later affirmed by a three-man State Court of Appeals.

Thus, seven Justices of the Louisiana Supreme Court overruled the Court of Appeals 4 - 3, and later granted a

Rehearing. With the original majority opinion writer of the original judgment retired, the Court again ruled 4 - 3 (one extra judge) hence even in the Louisiana Court system five Supreme Court justices have upheld Respondent's position a total of nine times. This is, of course, frivolity and has no standing before any Court.

Applicants' desperation in each of these Courts has created an inconsistent reliance on the United States' and State Court's jurisdictions in an effort to obtain any delay of the final accounting required to live up to the solemn guaranties originally given and so flagrantly violated even from the outset of the loan by honorable, upright attorneys.

First, Applicants as Directors and Officers of the defunct corporation sought relief in the Federal District Court for reorganization to obtain time, ostensibly to put the Debtor corporation on its feet and back into commerce. This, of course, required staying any State Court actions. [The corporation is still in reorganization for these ten years and nothing has been done but a disastrous liquidation providing obscene fees and almost total loss to secured as well as unsecured creditors with the stay order still in effect.]

When this separate suit on the continuing guaranty was filed against these individuals – Applicants not only used the reorganization but other personal suits to attempt to stay or continue the separate State Court action. This was successful for a long time and the State Courts attempted to grant leniency in the hopes that a reorganization might be the successful solution, particularly because of the magnitude of this case, – it was the biggest reorganization that had ever appeared in this Judicial District at the time.

Two years after the separate suit was filed the property

was sold and Applicants again jumped back to the State Court offering that the United States District Court had violated Louisiana Deficiency provisions by the Marshall's sale and that the Louisiana Court should be the determining jurisdiction over sales in Chapter X and the conditions imposed thereon. For the previous four years, they had been screaming that the matter was exclusively Federal jurisdiction.

When the Louisiana Supreme Court determined that the Deficiency Judgment Statute did not control the provisions of a sale under Chapter X, Applicants then changed their plea back and appealed to this Honorable Federal Court.

What should be observed is that the Respondent's action was never a foreclosure suit but was on separate cause of action taken by Respondent years prior to the sale of corporate Debtor's property. Creditors do not control a reorganization proceeding nor do they set the terms for sales ordered thereunder.

> "However, in corporate reorganization under Chapter X, the object is reorganization and recapitalization rather than liquidation, and in accordance therewith, the trustee is vested with the extraordinary power to sell or lease property in any manner which improves the strength of the debtor corporation and protects the creditors. This grant of authority is conferred by 11 U.S.C. # 516, which provides:
>
> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him

and the court –

* * *

> (3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, *to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve: * * *.*"

The only limit upon this power is the sound discretion of the judge; 11 U.S.C. #110(f) is specifically made inapplicable by the express wording of 11 U.S.C. #502. See also Judge Augustus Hand's statement in In Re Loewer's Gambrinus Brewery Co., 141 F.2d 747, 750 (2d Cir. 1944): "[Applicant's Brief, Appendix "B", Page 4B]

The United States District Judge sitting as a reorganization Judge has exclusive and extensive powers and discretion to order sales of the Debtor corporation's assets on whatever terms he exclusively concludes and any recommendations by creditors or otherwise only amount to just that – recommendations or suggestions whether the Judge accepts them is completely within his discretion. [11 U.S.C. # 516]

In final conclusion equity and the law both should militate that the delays which have impeded Respondent's lawful pursuit of relief under the separate guaranties executed by these exceptionally capable and knowledgeable attorneys should be at an end and that the purpose of a separate guaranty is for the specific case such as this that the principal co-obligor defaults by applying for bankruptcy relief.

ARGUMENT

This Court is aware of the weight and gravity of the Reorganizational Trustees' responsibility to the United States District Court and the facts indicate the Judge's solemn discretion in requiring an appraisal and that 75% of that amount be a minimum bid.

To hold that a separately commenced suit on a cause of action relating to the separate continuing guaranty should be defeated by a subsequent action of the United States District Judge and his trustee would invite a myriad of litigation over the Judges' exclusive jurisdiction and discretion and weaken the framework of the entire reorganization statute.

The Debtor corporation has indicated its hopelessness in arranging details to maintain its existence without the United States Court staying the State Court actions and to the utter hopeless degree of having to voluntarily surrender its property to the Court appointed Trustee representing the Debtor corporation.

The Louisiana Supreme Court in its Judgment of March 31, 1975 (Appellant's Brief Appendix B-1):

> The essential purpose of the jurisdictional statute . . . "is to render the authority and control of the reorganization tribunal paramount and all embracing to the extent required to achieve the ends contemptated by Chapter X; and to exclude any interference by the acts of others or *by proceedings in other Courts where such activities or proceedings* in other Courts that tend to hinder the progress of reorganization."
> 6 Collier 424 - 3.03 14th Ed 1972

". . .and further in their opinion Appendix 7 B of Applicants' brief in commenting on *Bowl - Opp, Inc. v. Larson*, 334 F Supp 222 (Ed LA 1971) (which also developed out of the same corporate reorganization proceeding as this case but which turned on the fact that there was no appraisal whatsoever required, differing from the instant case which did have an appraisal prior to sale), the Louisiana Supreme Court stated:

> ". . .In the instant case, Louisiana courts are confronted with the issue for the first time, and as we are not bound by the Federal Judge's interpretation of our law, we hold that the act does not apply to Chapter X sales . . ."

The Louisiana Deficiency Judgment Statute was depression legislation enacted to prevent creditors from availing themselves of rapid Louisiana Executive Procedures of obtaining the debtors' property and then obtaining a full Judgment against them.

It applied strictly to foreclosure sales where the creditor took advantage of the waiver of appraisal and confession of judgment provision to obtain debtors' property rapidly without a full trial. Judge Wisdom of the Fifth Circuit commented on the purpose of the Deficiency Statute:

> "The purpose of this Act is to deter a creditor from forcing a mortgagor to waive the benefit of the Louisiana appraisal requirements that at the foreclosure sale the highest bid reached at least two-thirds of the appraised value of the property. *Meadowbrook National Bank v. Massengill* 427 Fed. 1055, p. 1060 (5th Cir. 1970) [Also arising out of this same Reorganization]

The rights to preserve its deficiency amount is accomplished by requiring an appraisal and a minimum bid of 66 2/3% of such appraisal. The entire article is controlled by the condition in which the creditor provokes and controls the legal situation between the parties. [R.S. 13:4106, et seq.]

On the other hand corporate reorganization proceeding provide for immediate voluntary surrender of all of the debtor's property to the Federal appointed Trustee and the Courts exclusive jurisdiction and control thereafter. The basic purpose of the reorganization proceeding is to be able to prevent various state court actions from depleting the assets of the Debtor estate thereby preventing any possibility of a successful rehabilitation.

The Judge's absolute authority and discretion in a reorganization is even more exclusive than in ordinary bankruptcy proceeding as evidenced by 11 U.S.C.# 511 and the reference offered by the Louisiana Supreme Court on its original hearing, (Appendix 7B of Applicants' brief) Applicants claim that Trustee's action was directed by the secured creditor is a fiction which defies both the facts and the law and this Honorable Court's understanding of the power, statutorily resting in the United States District Court sitting as a reorganization tribunal.

Ordinarily, the jealousy existing between State and Federal tribunals militate each seeking an advantage over the other.

In the reverse twist of fate, this case stands for the surprising principle that the highest court of the State of Louisiana on two separate occasions reached the conclusion that the Louisiana Deficiency Judgment Statute should not be

engrafted on the already complex requirements under Chapter X of the Bankruptcy statute. This was an obviously positive attitude to increase the flow of commerce within the state so that foreign investors would not be any more discouraged by the unique nature of Louisiana laws in comparison with those of the other forty-nine states.

From the Federal standpoint to limit reorganization sales in some states and not others would require a multitude of minor procedural differences and would be suggestive of additional litigation impeding the hope of successful reorganization by any secondarily interested party.

This would not lead to the uniformity originally anticipated in the drafting of the Bankruptcy legislation for the equal protection and benefit of all citizens and would certainly lead to shopping for forums in matters that should be uniformly and equally administered in all Federal jurisdictions.

The Louisiana Supreme Court in its original Judgment of March 31, 1975 cited:

> 11 USC # 72 in determining that on June 21, 1967, title to all of Debtor corporation's property passed to the Trustee under 11 USC# 586,
>
> that all sales under straight bankruptcy must comply with 11 USC # 110(f) which requires appointment of appraiser and a price not less thatn 75%,
>
> that in corporate reorganization under Chapter X Trustee is vested with extraordinary power to sell or lease property in any manner which improves the strength of the debtor corporation

and protects the creditors. 11 USC #516.

the only limit on such power is sound discretion as required under 11 USC #502, stating appraisal not necessary.

Yet, in this case the Federal District Judge ordered the more stringent requirements which he was not obligated to do under Chapter X but would have only had to do under straight bankruptcy [which still has not taken place].

These were explained in reference to:

In re Dania Corp. 400 F 2d. 833
(3rd Circuit 1968)

The exclusive nature of the Judge's jurisdiction was cited: 11 USC # 511, and the Court distinguished the question in *Bowl-Opp v. Larson* 334 F. Supp. 22 (Ed LA 1971) from the case at bar in outlining that was a case in which there was no appraisal and the Supreme Court was not bound the interpretation of Louisiana law by the determination of a Federal District Court therein.

The analogous situation between the Louisiana Deficiency Judgment Statute's in-applicability to the Federal Ship Mortgage Act and the Bankruptcy Statute was relied upon in *McDermott v. Vessel MORNING STAR* 431 F 2d 714 heard en banc 457 F 2d 815 5th Circuit 1972).

The Louisiana Supreme Court in a rare Rehearing Judgment filed November 3, 1975 indicated that the present applicants were actually solidary co-debtors along with the

Debtor corporation as evidenced by the Guaranty instrument.

It further stated that the purpose for the Rehearing was not to overturn the previous judgment but to inquire as to a new point brought out by Applicants for the first time on rehearing application. After examination they were satisfied that the matter was not properly or procedurally before the Court and reaffirmed the judgment that the Louisiana Deficiency Judgment Statute was not applicable to sales under Chapter X.

CONCLUSION

For the reasons that this matter is not properly before the Court on the grounds of jurisdiction invoked, i.e., it is not to rule unconstitutional the Louisiana Deficiency Judgment Statute; the lack of a Federal question is admitted by Applicants; if it were Respondent's cause of action would exist more firmly; the unrestricted jurisdiction, authority and discretion of sales under Chapter X rests with the Federal District Judge and are not at the whims or directions of creditors; that any engrafting of various State Court procedures for sales would impair the uniformity of the Bankruptcy Statute and would in the absence of legislation inhibit the legislative intent for the United States District Judge to be absolutely free in his choice of sales and terms of Debtor's property in reorganization proceedings; and that the separate suit on a continuing guaranty of a solidary co-debtor, commenced one year prior to sale in the reorganization tribunal should not be invalidated by a subsequent sale ordered in the Court's sole and exclusive discretion for the primary purpose of relieving the Debtor's estate of a non-productive burden.

For these reasons and Applicants' often-mentioned acknowledgment that there is no Federal question present, and that it would impede the national interest for there to be a separate procedure for sales in each Bankruptcy jurisdiction, Respondent submits that Applicants' application for Writ of Certiorari should be denied and refused.

Respectfully submitted,

ROOS AND ROOS
Attorneys and Counsellors at Law

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New Orleans, La. 70112

CERTIFICATE

I hereby certify that the above and foregoing has been served upon Applicants by mailing a copy of same to its attorneys of record, C. Ellis Henican, Jr. and Carl W. Cleveland, of the firm of Henican, James & Cleveland, through the U. S. Mail, postage prepaid, and addressed to them at Suite 4440 - One Shell Square, New Orleans, La., 70139, this 3rd day of March, 1976.

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C LEO S. ROOS

APPENDIX "A"

"Continuing Guaranty . . .

"IN CONSIDERATION of the National American Bank of New Orleans, at my request giving or extending terms of credit to

PLACE VENDOME CORPORATION

hereinafter called debtor, I hereby give this continuing guaranty to the said National American Bank of New Orleans, New Orleans, La., hereinafter referred to as the Bank, its transferees or assigns, for the payment in full together with interest, fees and charges of whatsoever nature and kind, of any indebtedness, direct or contingent of said debtor to Bank, up to the amount of ($1,824,234.00) ONE MILLION EIGHT HUNDRED TWENTY-FOUR THOUSAND, TWO HUNDRED THIRTY-FOUR & NO/100 DOLLARS; whether due or to become due, and whether now existing or hereafter arising; I hereby bind and obligate myself, my heirs and assigns, in solido with said debtor, for the payment of said indebtedness precisely as if the same had been contracted and was due or owing by me in person, hereby agreeing to and binding myself, my heirs and assigns, by all the terms and conditions contained in any note or notes signed or to be signed by said debtor, making myself a party thereto; and, waiving all notice, including notice of demand, dishonor, or protest, and all pleas of discussion and division, I agree to pay upon demand at any time to said Bank, its transferees or assigns, the full amount of said indebtedness up to the amount of this guaranty, together with interest, fees and charges, as above set forth, becoming subrogated in the event of payment in full by me to the claim of said Bank, its transferees or assigns, together with whatever security it or

they may hold against said indebtedness. The Bank may extend any obligation of the debtor one or more times, and may surrender any securities held by it without notice, or consent from me, and I shall remain at all times bound hereby, notwithstanding such extensions, and/or surrender.

"This guaranty shall continue in full force and effect and shall be terminated only upon receipt by the Bank of written notice of revocation from me, or upon receipt of notice of my death, and that, in either of said events, my liability hereon shall continue as to obligations then existing, and as to any and all renewals or extensions thereof made after said event or events.

"IT IS EXPRESSLY AGREED that this continuing guaranty is absolute and complete, and that acceptance and notice of acceptance thereof by the Bank are therefore unnecessary and they are hereby expressly waived." (Emphasis provided) (Executed February 21, 1966.)

APPENDIX "B"

Respondent accepts and incorporated to this Brief by reference hereto and in toto the Appendices "B" and following – Pages 1B through 40B, inclusive, of Applicants' brief.